APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PER CURIAM: In the summer of 1963, the appellant unions and the appellee railroads had reached an impasse in their negotiations concerning proposed changes in working conditions, including the question whether firemen should be required on diesel-powered locomotives in freight and yard service. In order to avoid a nation-wide strike which was threatened in consequence, Congress adopted a Joint Resolution,[1] approved August 28, 1963, creating an arbitration board to decide what disposition should be made of the issues about which the parties were unable to agree. The Board's award, said Congress, "shall be binding on both the carrier and organization parties to the disputes and shall constitute a complete and final disposition of the aforesaid issues . . ."

After lengthy hearings, the Board made an award on November 26, 1963, with which the unions were dissatisfied. They filed these suits to impeach the award, as permitted by Section 9 of the Railway Labor Act, 45 U.S.C. § 159, which was made applicable by the Joint Resolution; they also attacked the Resolution as unconstitutional and asked preliminary injunctions against the enforcement of the award. The appellants in Nos. 18,331 and 18,332 filed a motion that a statutory three-judge court be constituted, in which the appellants in Nos. 18,333 and 18,334 did not join. The District Court denied the motion for a three-judge court, and disposed of cross-motions for summary judgment by granting that of the defendants, denying that of the plaintiffs, and dismissing the complaints. The unions appeal.

Error is charged in the denial of the motion for a three-judge court. The Brotherhood of Locomotive Firemen

[1] Public Law 88-108, 77 Stat. 129.

necessarily based the motion on its allegation that the Joint Resolution is unconstitutional and on its prayer that

> "Said defendants and said other carriers and persons be preliminarily enjoined and restrained from putting said award in effect until a hearing is had and a determination made by the Court of the right of the plaintiffs to a permanent injunction."

It is well understood that a plaintiff is not entitled to a three-judge court merely because he prays for an injunction against the enforcement of a statute he claims is unconstitutional. There must at least be an allegation that enforcement is threatened and therefore imminent. In this case there was no such allegation; in fact, we were told the parties have stipulated that nothing would be done to effectuate the award before the termination of this litigation. There must also be substantial grounds for the charge that the statute is unconstitutional. In this case, there was none, as the District Court's opinion pointed out.

We have given meticulous consideration to the parties' voluminous briefs and extensive oral arguments, and have concluded that the opinion of District Judge Holtzoff is a correct and adequate disposition of the issues presented. On the basis of his opinion, 225 F. Supp. 11 (1964), we affirm his judgment.

It is so ordered.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*. I agree with my colleagues that the award was in accordance with the governing statute, Public Law 88-108, 88th Cong., 1st Sess., 77 Stat. 129. The objections to the Board's actions which are here raised concern matters within its special competence.

However, I would reverse and remand so that a District Court of three judges may consider the constitutionality

of the statute. It seems clear to me that the constitutional issues raised are substantial, and that, unless an injunction issues, the statutory scheme will continue in force prohibiting the unions from striking. P.L. 88-108, § 1. Thus a three-judge court is required. 28 U.S.C. § 2282.

The issue of constitutionality raised in these suits cannot be decided within the special review provided by the governing statute. That statute, 44 Stat. 585, 45 U.S.C. § 159, in providing for review by the District Court and this court of the Board's award, states:

> "Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:
>
> "(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;
>
> "(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or
>
> "(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: * * *"

Neither unconstitutionality nor nonconformity with the laws of the land is listed as a ground for impeachment. Consequently, the statute prohibits consideration of constitutional issues in the special proceedings under it. Thus this statute differs from special review statutes which authorize consideration of whether an action is "in accordance with law" (*e.g.*, Revenue Act of 1936, ch. 690, § 906 (g), 49 Stat. 1750; Agricultural Adjustment Act, 52 Stat.

63, 7 U.S.C. § 1366). Under such statutes, constitutional issues may be raised and decided. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345 (1937); *Lee* v. *Roseberry*, E.D. Ky., 94 F.Supp. 324, 327 (1950) (three-judge court). Accord, *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 139 (1947); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). *Cf. Eastern States Petroleum Corporation* v. *Rogers*, 108 U.S. App. D.C. 63, 280 F.2d 611, *cert. denied*, 364 U.S. 891 (1960). No such authorizing phrase is contained in the statute here. 45 U.S.C. § 159, Third.

Moreover, the statute here apparently forecloses review by the Supreme Court in providing that "The determination of said court of appeal[s] upon said questions shall be final." 44 Stat. 586, 45 U.S.C. § 159, Sixth. This provision raises the presumption that Congress did not intend constitutional issues to be considered within such a proceeding, for the intention to prohibit Supreme Court review of constitutional questions should not lightly be imputed to legislators sworn to uphold the Constitution. Compare *Eastern States Petroleum Corporation* v. *Rogers*, *supra*, 108 U.S. App. D.C. at 66, 280 F.2d at 614, and cases there cited.

I conclude, therefore, that a three-judge court should have been empaneled to hear and decide the constitutional issues raised by plaintiffs.

APPENDIX B

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders and judgment of the District Court appealed from in these cases are hereby affirmed.

It is FURTHER ORDERED by the court that a certified copy of the judgment of this Court shall be issued FORTHWITH to the District Court.

Per Curiam.

Dated: February 20, 1964.

Circuit Judge Wright concurs in part and dissents in part.

APPENDIX C

(Filed January 8, 1964)

Civil No. 2921-63

Opinion

* * * * * * * * * *

These two actions are brought to impeach and set aside an award of a special arbitration board created under an act of Congress approved August 28, 1963, Public Law 88-108, 77 Stat. 129, in order to avoid a threatened nation-wide railroad strike, which was then imminent. The function of the board was to arbitrate and make an award concerning two basic issues that were in controversy between the railroads and their staffs. The plaintiffs in these two actions are four organizations or brotherhoods composed of operating railroad employees. They are dissatisfied with the decision and seek to set it aside. Most of the defendants are railroads, all of which have accepted and acquiesced in the award. The remaining defendants are the chairman of the arbitration board and the Attorney General. The United States has intervened as an additional party defendant. As judicial review in this case must be limited to the administrative record and the Court is restricted to passing only on questions of law, the matter has been presented by cross motions for summary judgment.

The present dispute comprehends practically all the Class I railroads in the United States and their operating employees. It arises out of drastic and radical technological changes that have taken place in the transportation industry. Specifically, it is caused by the revolutionary advance consisting of the abandonment of steam power on railroads and the substitution of diesel engines. Principally, what is involved is the status of firemen on railroad locomotives. As their name indicates, their primary function on steam locomotives was to stoke the furnace and keep the fires burning underneath the boilers. They also performed another duty, namely, watching the road and the signals from the left side of the cab, as the engineer sat on the opposite side and made his observations from the right hand window. With the abandonment of steam power and the introduction of diesel engines, there were no longer any fires to keep burning or any furnaces to stoke. The question arose, "What is to become of the fireman?" There is no dispute that they were still necessary on passenger trains in order to perform their secondary function and their status in passenger traffic is not involved in the present controversy. The railroads claimed, however, that they were no longer needed on freight trains, because the duty of watching the road from the left side could be performed by other employees. The railroad brotherhoods, on the other hand, took the position that because they rendered this vital service, firemen should be continued on freight trains. This controversy also comprehended engines operated in yard service. Approximately 30,000 employees were involved. Both sides agreed that as a matter of social justice and enlightened fairness to the men, especially those whose career had been lengthy, there should be no immediate large scale discharge of employees; that some degree of security be granted to them; and that the abolition of the jobs should be accomplished by some gradual process of attrition. Manifestly, the railroads felt a sense of moral responsi-

bility to the veteran workers. Nevertheless, it is quite evident that they also thought that there should be a reasonable limit to their generosity. The extent of the security and the groups of men to whom it should be extended, were in sharp dispute.

A second question in controversy was the composition of train crews. The railroads contended that as a result of modern improvements and innovations the size of many train crews could be substantially reduced. In addition, there were many other problems that divided the contending parties, that were of lesser magnitude and importance and are not involved in these actions.

In order to understand clearly the special legislation creating the arbitration board, it is desirable to recapitulate briefly the salient events that preceded its enactment. The status of firemen on freight trains and yard service had been disputed and discussed from the beginning of the shift from steam to diesel power. The controversy was brought to a head on November 2, 1959, when the carriers issued notices proposing the elimination of firemen in freight and yard service. As has already been stated, there was no desire or intention to do away with them on passenger trains. These notices also proposed the abrogation of regulations fixing the size of train crews. On September 7, 1960, the employees' organizations in turn served a series of notices containing counter-proposals, which, among other things, would have continued and even extended the use of firemen and would have required not less than one conductor and two trainmen in all train crews plus such additional persons as were required to assure maximum safety.

In an endeavor to adjust the differences between the parties and to settle the controversy, the President of the United States, in November, 1960, created a special commission, known as the Presidential Railroad Commission.

This body, after a prolonged investigation and protracted and thorough study, submitted a report on February 26, 1962, containing a series of recommendations. The carrier members of the Commission accepted it although expressing some dissatisfaction. The members representing the employees dissented and rejected most of the proposals.

There followed a series of unsuccessful negotiations pursuant to the Railway Labor Act, in the hope of arriving at a peaceful and amicable settlement of the dispute. In a further effort to avert the strike, which might have resulted in an economic disaster, the President, on April 3, 1963, appointed an Emergency Board known as Emergency Board No. 154. On May 13, 1963, this board submitted a report making recommendations for an adjustment of the issues. The employees' organizations proved unwilling to accept them. Strenuous negotiations were resumed, in which the Secretary of Labor took an active part. On August 2, he submitted a memorandum, accompanied by a series of documents, enumerating and defining the various issues in controversy and endeavoring to indicate areas in which, in his judgment, there was the largest possibility of agreement. A suggested plan for a voluntary arbitration followed, but proved abortive. A strike was imminent. The country was confronted with a serious emergency. A nation-wide railroad strike would have been a calamity. Congress alone could avert the catastrophe. The national legislature was not found wanting. It expeditiously fashioned and invoked a drastic measure. As was said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 426, "While emergency does not create power; emergency may furnish the occasion for the exercise of power." It promptly passed a Joint Resolution, which was approved

by the President on August 28, 1963, Public Law 88-108, 77 Stat. 129.[1]

This enactment expressly prohibited any strike (Section 1). It authorized the creation of an arbitration board to consist of seven members, two to be designated by each of the contending groups and three additional members to be selected by the other four. If the four failed to agree on the three neutral members, the latter were to be appointed by the President, and this is what happened. The President named the three neutral members, one of whom was elected chairman (Section 2).

The board was directed to pass on two issues: the use of firemen on other than steam-powered locomotives; and the size and composition of train crews (Section 3). Thus, Congress, in effect, ordered a compulsory arbitration of these two basic differences. It provided that the arbitration should be conducted pursuant to Sections 7, 8, and 9 of the Railway Labor Act, 45 U.S. Code, Sections 157-159 (Section 4). The board was directed to conclude its labors within ninety days (Section 5). Its award was to be deposited in this Court and was to be binding on the parties (Section 4). It was not to become effective until sixty days after filing (Section 5).

In connection with the proceedings, Congress directed the Secretary of Labor to furnish to the board and the parties, copies of his statement of August 2, 1963, to which reference has already been made, and the accompanying papers. The board was required to incorporate in its decision any matters on which it "finds" the parties were in agreement, to resolve the matters on which they were not in agreement and to give due consideration to those matters as to which they were in tentative agreement (Section 3). Section 7a of the statute set forth the standards

[1] The text of this Joint Resolution, without, however, including its recitals is also found in 1963 Pocket Part to 45 U.S.C.A. under Section 157.

and the criteria by which the board was to be governed. It was to give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which had been accomplished in bargaining and mediation.

The board promptly organized and held a continuous series of hearings, at which testimony of numerous witnesses was heard and a large number of exhibits were introduced in evidence. Its award was filed on November 26, 1963. By the terms of the statute it becomes effective on January 25, 1964.

The award contains detailed provisions. It is accompanied by a comprehensive, and well-reasoned opinion of the neutral members, which also includes findings of fact. The decision distinguishes between the question as to what positions should be eliminated or abolished and the question as to how and when such abolition should take place and to what extent the status of the present incumbents should be protected. The board reached the conclusion that firemen, although no longer performing their basic and original function, do, in fact, render necessary services, namely, watching the road and the signals from the left side of the cab. It further held, however, that firemen were not indispensable for this purpose, because on freight trains, unlike passenger trains, there were three men in the cab instead of two, the third being the head brakeman and that the head brakeman could fulfill this task. It is true that firemen also made necessary mechanical adjustments when needed, but the board determined that this work could be done by the engineer or by maintenance groups at terminals. As to the yard service, the board decided that a second man in the cab was unnecessary, since other employees standing on the ground or walking along the track gave necessary guidance to the

engineer. The ultimate conclusion reached, therefore, was that firemen were no longer needed in freight or yard service and that these positions could be eliminated, with the limitation as to yard service that the engine must be equipped with an automatic control. The board further found that there were exceptional situations in which the services of a fireman might be necessary. Accordingly, it ordered that ten per cent of the firemen in freight and yard service be retained, and prescribed a method for ascertaining and determining the employees to be included in that group.

The board prescribed liberal protection for existing employees. It preserved security of tenure for a great many of the firemen regularly in the employ of the railroads at the time when the award becomes effective even though their services could well be dispensed with. Accordingly, all firemen hired more than two years prior to the effective date of the award and in active service at that time were to retain their rights to employment and seniority until death, retirement, resignation or discharge for cause, with the qualification that those firemen who had a seniority of only two to ten years might be offered other comparable positions for which they were or could become qualified. The offer of another job was to carry with it the payment of any relocation expenses. Firemen hired within two years prior to the effective date of the award were not to be entitled to retain their employment or seniority rights, but if their services were terminated, they were to receive a lump sum separation allowance, amounting to six months' pay for those with two full years of service; three months' pay for those whose length of service was between one and two years, and for those with less than one year's service, five days' pay for each month of service. Part-time and furloughed employees, that is, those whose earnings had not exceeded $200 during the two years immediately preceding the effective date of the award, were to be paid if separated from the service,

a severance allowance equal to their earnings during the preceding two years. They might, however, elect to remain on the seniority list with rights to such work as might become available to them. Whenever a job became vacant in such manner that it could not be filled without hiring a new employee, it might be abolished, but not otherwise.

To summarize, even though the board found these positions to be unnecessary, except as to a small fraction of about ten per cent, they were to be abolished only gradually by attrition caused by death, resignation, retirement, or discharge for cause. This process might consume many years, although perhaps it was likely to become accelerated with the passage of time. Thus all firemen in active service for more than two years were guaranteed a permanent continuation of their existing status until death, retirement, resignation or discharge for cause.

The second issue determined by the board was the size and composition of train crews. The award directed that no change be made in any stipulated number of members of train crews, except pursuant to its provisions or by agreement. It was further provided that where two or more trainmen were required at that time, any party in interest might give notice of a proposed change in the composition of the train crew. If no agreement was then reached, the issue could be referred by either party to a special board of adjustment to be created in the manner prescribed by the award. A series of specific and concrete principles or "guidelines" to be followed by these special tribunals in arriving at their decisions, were formulated and set forth. In view of the fact that possibly thousands of minor controversial situations might arise from time to time in different parts of the country, each depending in large part on local and possibly temporary conditions, it was obviously impracticable for the board to enunciate any rigid and inflexible formula as to the composition of all train crews throughout the United States or to decide

every one of the numerous individual cases. It manifestly was impossible to do so within the time at its disposal, since the statute required the board to make a final report within ninety days. The award enunciated, however, a definite practicable method to solve these multitudinous problems as they arose. Trainmen and similar employees, other than those on furlough at the time of the effective date of the award, were to retain their rights to service assignments to the extent of available positions.

The neutral members of the board were unanimous in their decision. The representatives of the carriers concurred, but nevertheless, filed a memorandum expressing the view that the award was much more liberal to the employees than it should have been. The employees' representatives filed strong dissenting statements. Their position seems to be that the award was not sufficiently liberal to the employees. Specifically, their grievance is that certain categories of employees are excluded from the benefits of permanency of seniority; principally, those in the furloughed group. Moreover, they objected to the privilege accorded to the carriers to offer comparable jobs to employees of less than ten years seniority.

Since the merits of the decision are obviously not subject to judicial review, the present actions are predicated on two contentions: first that the award does not conform to the requirements of the statute; and second, that the statute is unconstitutional.

The scope of judicial review in this case is exceedingly limited and narrow. Section 4 of the enabling Act provides that the award shall be subject to Section 9 of the Railway Labor Act, 45 U.S. Code 159. Paragraph Second of the last-mentioned section permits an action to be maintained to impeach an arbitration award. Paragraph Third prescribes the following range of judicial review:

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate. . . ."

Another paragraph permits the court to impeach an award on the ground of fraud or corruption, but this provision is not relevant here. Thus, this court may consider only whether the award conforms to the requirements of law or to the stipulations of the agreement to arbitrate. In this instance, the enabling Act supplants an agreement to arbitrate.

The court may not review the question whether there is substantial evidence to sustain the findings of fact. It follows hence that the scope of review in this instance is much narrower than that which generally prevails in connection with administrative decisions. Counsel for the plaintiff in the second of these actions argued that the question whether substantial evidence sustained the findings was open in this court on the ground that the Administrative Procedure Act was applicable. Counsel for the plaintiff in the first action affirmatively declined to join in this position. He was well advised in taking this attitude, because the contention is manifestly untenable. The Administrative Procedure Act expressly excepts from its coverage those agencies that are composed of representatives of the parties to disputes determined by them. 5 U.S. Code, 1001. Obviously, this provision includes agencies composed even partially of representatives of the parties, as is the case here.

Moreover, the Railway Labor Act is a specific statute directed and limited to proceedings of a special type. The Administrative Procedure Act is general legislation. It is well settled that a specific statute will not ordinarily be deemed superseded, amended or repealed by a later enactment of a general character. *Baloca Watch Company* v. *United States*, 365 U.S. 753, 758.

Even if, however, the court were authorized to consider the question whether the findings are sustained by substantial evidence, such a doctrine would not avail the plaintiffs. Counsel have not sufficiently shown that any specific finding of the board is not supported by substantial evidence. At most, they have argued that controverted evidence might have warranted a different conclusion. The well-reasoned opinion of the board convincingly shows that the board thoroughly weighed the evidence and that there was a rational basis for its conclusions.

Even under the broader doctrine as to judicial review of administrative decisions, the court may not go beyond this point. There was nothing arbitrary or capricious about the decision. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-7.

The board displayed extreme consideration and even benevolence for the future of employees in regular service. Many of the employees may remain at their posts for years to come. No ruthless wholesale discharges were contemplated. The carriers are not objecting to incurring this expense, apparently accepting it in a far-sighted manner as the price that they must pay for eventual permanent elimination of firemen from freight and yard service. Society is helped by not being confronted with a large sudden addition to the ranks of the unemployed, which might have had an adverse effect on the national economy, might have unduly burdened unemployment insurance rolls and possibly created an additional load on relief and welfare funds. Regular permanent employees have no

just grievance. They are protected for the period of their working life. Short-term employees as well as those who have been in a furloughed status for a long time hardly have any moral rights or equities at the hands of railroads.

A large part of the lengthy written and oral arguments on the part of plaintiffs' counsel was directed to the merits of the award. They claim, as has been previously stated, that it was not sufficiently liberal to the employees. Obviously, such matters may not be considered by the court.

The basic argument as to the law was a contention that the award should be deemed invalid on the ground that it departed from the limitations of the statute. This contention was predicated on the direction in Section 3 of the enabling Act that "the arbitration board shall incorporate in such decision any matters on which it *finds*[2] the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall . . . give due consideration to those matters on which the parties were in tentative agreement." Plaintiffs' counsel would construe the first clause of this sentence as a mandate to the board to accept and give effect to whatever agreements had been reached during the negotiations and as a restriction of its jurisdiction only to those points as to which there was no accord. While the statute is not as clear as it might be, the court is of the opinion that plaintiffs' counsel have misconceived its meaning. Congress did not say and manifestly did not intend what plaintiffs' counsel would read into the Act. The statutory instruction should be interpreted as directing the board to consider and refer in its decision to any matters as to which it finds the parties were in agreement. It does not command the board to adopt such agreements. There was no intention on the part of the Congress to circumscribe the board in this manner. Obviously, the purpose of the

[2] Emphasis supplied.

clause was to point the attention of the board to any agreements reached in order that the board might give them due weight, but not to limit its discretion in arriving at a final decision.

Any indefiniteness or ambiguity in the phraseology of this clause is resolved by the Committee reports. See Senate report No. 459 dated August 23, 1963 (U.S. Congressional and Administrative News, September 20, 1963, pp. 1399, 1406). In discussing Section 3, the Senate Committee on Commerce states: "The board in reaching its decision would consider areas in which the two parties were in agreement, those areas in which there was tentative agreement, and those areas where no agreement existed." It is clear, therefore, that all that the board was required to do was to consider these matters without being bound by them.

Any other construction would seem unreasonable. In the course of prolonged negotiations, an accord may be reached on some points. Ordinarily, however, parties do not consider such fragmentary stipulations binding unless a final agreement is concluded as to all matters in controversy. Conceivably, one or more of many subjects disputed in the course of protracted discussions may be separately resolved, but if there is no final understanding, the parties may not consider themselves bound by the partial steps.

Actually, the board in its opinion analyzed all of the negotiations between the parties, indicated matters on which there had been agreement and those as to which the parties were deadlocked. Its opinion is replete with such references. For example, it indicates that there was a complete disagreement as to the proposed elimination of firemen's jobs; that there was a common recognition of the fact that where a job has been found unnecessary, the equities of the fireman working on the job should affect the method and time of its elimination; but that there was

no agreement as to the details of working out these equities. (See page 20 of Opinion of Board.)

There is still a further fallacy in counsel's argument. No definite agreement is to be clearly found in any single document or series of documents. On what points the parties were in agreement or in disagreement or in tentative agreement can be ascertained only by a laborious comparison and detailed analysis of numerous letters, memoranda and statements, many of which are ambiguous. In fact, there were disputes between the parties as to the points on which they had arrived at an accord. The board, in effect, had to make findings from disputed evidence as to what matters had been agreed upon. Obviously, the Congress must have had this thought in mind because the statutory provision refers to matters on which the board "finds" the parties were in agreement. In other words, the board had to undertake a fact-finding process in order to make the determination what agreements had been reached. Manifestly, such findings are not subject to review.

Even if, however, the interpretation that plaintiffs' counsel would attach to the statutory provision were to prevail, it would avail them nought. The have not clearly or convincingly demonstrated that any finding of the board was erroneous. There are involved matters of inference and deduction from numerous documents and statements, many of which were far from definitive. The court concludes, therefore, that the objection that the board has failed to comply with its charter in this respect is not well founded.

Counsel for the plaintiffs further urge that the board failed to comply with the requirement of Section 3, that the award should constitute a complete and final disposition of the issues covered by its decision. They point to the fact that the board provided that numerous individual disputes concerning the sizes of train crews should be re-

ferred from time to time to local boards and they argue that such a provision constituted a failure on the part of the board to make a complete and final disposition of the issues. This contention is entirely lacking in merit. What the board did was to bar any changes for the time being and to prescribe a definite formula and a group of concrete principles to govern the determination of numerous disputes that were bound to arise in the future as to the composition of train crews on individual trains. Conceivably, there could be thousands of such disputes from time to time. It then constructed machinery for the disposition of these matters. These provisions must be deemed in essence to constitute a complete and final disposition of the issues. The situation is analogous to that of an interlocutory judgment determining issues framed by the pleadings or by a pre-trial order, followed by a reference to a special master to state an account or assess damages on the basis prescribed by the court.

It is an elementary principle of statutory construction that every statute must receive a sensible and reasonable construction. *United States* v. *American Trucking Associations*, 310 U.S. 534, 542. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459.

It would be highly unreasonable to construe this statute as requiring the board itself to fix permanently the number of members of the crew on each of many thousands of trains in the United States. To perform this task at one central point would not be feasible and even if it were at all practicable it would consume many months and maybe years. The board complied with the spirit of the statute by providing, first, that there should be no change for the time being in the composition of any train crew, by prescribing specific formulae and principles for guidance in the determination of any requested modifications; and creating a decentralized local machinery for adjudicating disputes as to any proposed change. This decision

must be deemed a final disposition and solution of this problem.

It is then urged in behalf of the plaintiffs that the arbitration board lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards. Counsel called attention to the fact that the parties in their negotiations had agreed that such expenses should be assumed by the Government. As heretofore stated, however, the board was not bound by agreements made by the parties. Moreover, as to this matter, it is very simple for two persons to agree that the Government should bear the expenses of some proceeding. No one is, however, authorized to bind the Government in this manner. Consequently, any such agreement would be a nullity. The arbitration board, was not empowered to impose such a liability on the Government. Congress alone may do so. Consequently, it was entirely proper and reasonable for the board to provide that such expenses should be borne by the parties to the proceedings.

In view of the foregoing considerations, the court reaches the conclusion that the award is valid. It is within the statutory authority of the board and is not subject to any infirmity. There remains for consideration the challenge to the constitutionality of the statute under which the board acted.

At the opening of the oral arguments, counsel for the plaintiffs in civil action No. 2919-63 moved that in view of the fact that a constitutional question was involved, a three-judge court be convened pursuant to 28 U.S.C. 2282. Counsel for the plaintiff in civil action 2921-63 expressly and affirmatively declined to join in the application expressing the view that this provision was not applicable. The defendants opposed the motion. This court denied it on the ground that the action was not for an injunction, but for a decree impeaching and setting aside the award and that the prayer for an injunction was surplusage. It

was the opinion of this court that no action for an injunction would lie. The relief sought was substantially in the nature of a declaratory judgment. The court based its ruling on *Thompson* v. *Whittier*, 365 U.S. 465 reversing 185 F. Supp. 306, 307; *International Ladies' Garment Workers' Union* v. *Donnelly Garment Company*, 304 U.S. 243, 250; and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154.

The power of the Government to regulate persons engaged in a public calling or in a calling coupled with a public interest has its roots in the common law. If a business of this type enters interstate commerce, the legislative power is lodged in Congress as a result of authority conferred on it to regulate commerce between the States. Some of these principles were summarized and enunciated by the Supreme Court in the celebrated case of *Munn* v. *Illinois*, 94 U.S. 113, 126, where Mr. Chief Justice Waite wrote as follows:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

It is elementary that railroads, as common carriers for hire, are engaged in a public employment affecting the public interest, and, therefore, are subject to legislative control. *Chicago, Burlington and Quincy Railroad Co.* v. *Iowa*, 94 U.S. 155, 161. In fact, railroads constitute a typical and perhaps the most common type of public calling. With modern industrial and commercial developments there has been a natural tendency to expand the regulatory power of Congress over businesses engaged in interstate commerce. On the one hand new categories of occupations have been brought within its coverage, as for instance the operation of a grain elevator, *Munn* v. *Illinois*, *supra*; and the dairy industry, *Nebbia* v. *New York*, 291

U.S. 502. So, too, it has been extended to additional types of control. Originally, such regulation was directed principally to rates and charges exacted from the public and to services rendered to patrons and consumers. It has been expanded to include such matters as safety requirements, hours of labor and similar subjects. The Supreme Court has gone as far as to sustain a statute regulating minimum wages paid to employees in any business affecting interstate commerce, irrespective of whether it is in the category of a public calling. *United States* v. *Darby*, 312 U.S. 100, 117. The regulatory power extends not only to management but to employees as well. Thus, it was stated in *Wilson* v. *New*, 243 U.S. 332, 364:

> "When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

The decision in *Wilson* v. *New*, *supra*, related to a situation very similar to that presented in the instant case. In March, 1916 the country was confronted with a nation-wide railroad strike, as it was in this instance. It originated in a controversy concerning hours of work and wages of railroad employees. The Congress solved the problem by passing a statute fixing an eight-hour standard work day on all railroads and providing that compensation of their employees should not be reduced below the then standard day's wage, pending an investigation by a Presidential Commission. The constitutionality of this statute was challenged in the same manner as is being done in

the case at bar. The Supreme Court upheld the validity of the Act as within the regulatory power of Congress.

Counsel for the plaintiffs attempt to distinguish the two statutes in that the 1916 Act involved in the *Wilson* case was a legislative decision as to hours and wages, whereas in the Act here involved, the Congress delegated to a board the power to make the determination. It requires no argument, however, to demonstrate that Congress has the authority to delegate its legislative power in this respect to administrative agencies. It has done so in respect to various fields, such as carriers, to the Interstate Commerce Commission; electric power, to the Federal Power Commission; radio and television to the Federal Communications Commission, and the like.

The suggestion was made during the oral arguments that compulsory arbitration was a far reaching innovation. This contention is hardly accurate. The Railway Labor Act, by the creation of the National Railroad Adjustment Board and the powers conferred on it, in fact, provided for compulsory arbitration of minor disputes between carriers and labor organizations as far back as 1926, 45 U.S. Code 153. Countless proceedings of this nature have been conducted under it over the years.

In their reply arguments, counsel for the plaintiffs with commendable candor finally conceded that Congress had the power to enact legislation of the type involved here, and were relegated to the position that the enabling Act was vulnerable solely because it failed to prescribe sufficient and adequate standards to be followed by the agency. The law, however, does not require that the standards and guides be defined with the accuracy and precision of a mathematical formula which can be applied automatically. They need not be an exact yardstick. It is sufficient if Congress indicates a general criterion or an aim to serve as a guide to the administrative agency. The present statute clearly complies with this requirement.

Section 7 prescribes the following standards: "Adequate and safe transportation service to the public"; "interests of the carrier and employees affected"; "due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation." Under the authorities about to be discussed these standards are fully adequate to save the statute from a successful challenge on the ground of indefiniteness. In fact, many provisions of a more general character have been upheld by the Supreme Court.

For example, in *Yakus v. United States*, 321 U.S. 414, 423, the Supreme Court, in an opinion by Mr. Chief Justice Stone, sustaining the validity of the Emergency Price Control Act of 1942 held that the following standards complied with the constitutional requirement: that the prices fixed by the Administrator should further the policy and conform to the standards prescribed by the Act; that prices were to effectuate the declared policy of the Act to stabilize commodity prices so as to prevent inflation and its enumerated disruptive causes and effects; that the prices established must be fair and equitable and that in fixing them due consideration should be given to prevailing prices during a designated base period. Obviously, these standards were no more precise or definite than those involved in the instant statute.

In *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, the Supreme Court, also in an opinion by Mr. Chief Justice Stone, sustained the validity of the Fair Labor Standards Act. It held that the following standards prescribed by the Act were sufficiently definite: the declared policy of the Act to raise minimum wages to forty cents an hour as rapidly as economically feasible without substantially curtailing employment and to determine the highest minimum wage rates with due regard to economic and comparative conditions.

Numerous other examples may be cited. To select but a few illustrative instances, the following standards have been held sufficient and adequate: "public interest, convenience or necessity," *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86-90; "public interest," *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24; "just and reasonable rates," *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 600; "excessive profits," *Lichter* v. *United States*, 334 U.S. 742, 775.

The conclusion is inescapable that the standards as defined in the enabling Act are sufficiently adequate and definite. The statute is not vulnerable to any attack on the ground of unlawful delegation of power without proper standards. The statute is clearly constitutional as being within the power of the Congress. In fact, this court should have been justified in denying the motion for the convening of a three-judge court on the ground that no substantial constitutional question is presented, as well as on the procedural ground on which it acted.

In the light of the foregoing discussion, the award made by the arbitration board is valid; the Congress had power to order the arbitration; and, the board acted lawfully within the orbit of the authority delegated to it.

The defendants' motions for summary judgment are granted. The plaintiffs' motions for summary judgment are denied. Counsel will submit an appropriate order.

/s/ ALEXANDER HOLTZOFF
United States District Judge

January 8, 1964.

APPENDIX D

Public Law 88-108, 77 Stat. 129

WHEREAS the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations threatens essential transportation services of the Nation; and

WHEREAS it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

WHEREAS all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

WHEREAS the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

WHEREAS it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

WHEREAS, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

WHEREAS, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew

consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

No carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 6, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a number or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to com-

pensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties in dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections

and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however*, That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX E

Railway Labor Act, § 9 First-Seventh (45 U.S.C. §§ '59 First-Seventh)

Sec. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however*, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper under-

standing and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

APPENDIX F

Section 13 of the Railway Labor Act as originally enacted (Act of May 20, 1926, 44 Stat. 577, 587) was as follows:

> SEC. 13. (a) Paragraph 'Second' of subdivision (b) of section 128 of the Judicial Code, as amended, is amended to read as follows:
>
> 'Second. To review decisions of the district courts, under section 9 of the Railway Labor Act.''
>
> (b) Section 2 of the Act entitled 'An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit court of appeals and of the Supreme Court, and for other purposes', approved February 13, 1925, is amended to read as follows:
>
> 'SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and under sec-

tion 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.'

APPENDIX G

The relevant provisions of the Judiciary Act of 1925 (Act of February 13, 1925, 43 Stat. 936, 938, 939) are as follows:

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with the effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal. . . .

. . . . . .

SEC. 2. That cases in a circuit court of appeals under section 8 of 'An Act providing mediation, conciliation, and arbitration in controversies between certain employers and their employees,' approved July

15, 1913; . . . are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

The relevant provisions of 28 U.S.C. 347, 1940 ed., are identical with those of Section 240, 43 Stat. 938, 939, above, except that in Sectio n347(a) the words "United States Court of Appeals for the District of Columbia" were substituted for the words "Court of Appeals of the District of Columbia" and except that both Section 347(a) and Section 347(b) omitted the words "writ of error or."

The relevant provisions of 28 U.S.C. 348, 1940 ed., are as follows:

SEC. 348

. . . . . .

Cases in a circuit court of appeals under Section 159 of Title 45 . . . are included among the cases to which Sections 346 and 347 of this title shall apply.

The relevant provisions of the Judiciary and Judicial Procedure Act (Act of June 25, 1948, 62 Stat. 869, 928, 984, 992, 1001, which are presently in effect (28 U.S.C. 1254, 2680) are as follows:

§ 1254. Court of appeals, certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

§ 2680. Exceptions.

SEC. 39. The sections or parts thereof of . . . Statutes at Large enumerated in the following schedule are hereby repealed . . .

• • • • • • • • • • •

Schedule of Laws Repealed.

Date	Statutes at Large Chapter	Section	Volume	Page	U. S. Code Title	Section
• •	•	•	•	•	•	•
1926						
May 20	347	13	44	587	28	225,348
• •	•	•	•	•	•	•